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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

G. FRANK POURZIA,

Plaintiff and Appellant,

v.

ST. MARY MEDICAL CENTER,

Defendant and Respondent.

B207394

(Los Angeles County
Super. Ct. No. NC034832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deanne Smith-Myers, Judge. Affirmed.

Law Offices of Jonathan G. Shibley and Jonathan G. Shibley for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Barry S. Landsberg, Doreen Wener Shenfeld and Joanna S. McCallum for Defendant and Respondent.

Dr. G. Frank Pourzia, a cardiologist, appeals from the judgment denying his petition for a writ of administrative mandamus, directed to St. Mary Medical Center (St. Mary), seeking to vacate the decision by St. Mary to revoke his staff privileges. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Initial Investigations of Dr. Pourzia's Behavior and Competence

Dr. Pourzia was granted staff privileges at St. Mary in 1991. In May 1997 he was informally reprimanded following a confrontation with a cardiology technician who, according to Dr. Pourzia, had not been doing his job properly. The technician complained Dr. Pourzia had been insulting and unprofessional in his criticism and had used offensive language and ethnic slurs. Dr. Pourzia acknowledged the incident but denied he had acted or spoken improperly. Dr. Stephen Shea, then chief of staff at St. Mary, recommended that Dr. Pourzia seek professional counseling in stress and anger management before his problematic conduct required formal corrective action.

In late November 1997 a director of cardiology/radiology reported Dr. Pourzia had admonished a nurse in an unprofessional manner, screaming at her in front of a patient and again using offensive language. Several days later Dr. Shea was notified by Dr. Amar Kapoor, the director of the cardiac catheterization laboratory, that laboratory employees “have repeatedly complained about the unruly and disruptive behavior of Dr. Pourzia.” More significantly, Dr. Kapoor also reported serious concerns about Dr. Pourzia’s judgment and skills in the performance of cardiac interventional procedures,¹ stating, “[h]e is incompetent and may be dangerous to the patients on whom he performs these procedures.”

In December 1997 Dr. Shea referred the matter to the Medicine Committee, an operational subdivision of the organized medical staff at St. Mary (formally known as the Medical Staff of St. Mary Medical Center, Long Beach, California), and directed an

¹ Interventional cardiology uses catheterization-based techniques (for example, angioplasty) to treat various forms of heart disease.

investigation subcommittee be appointed. The subcommittee asked two outside experts, Dr. William French and Dr. Tyson Cobb, to review specific patient charts and to evaluate the quality of Dr. Pourzia's patient care. In January 1998 Dr. French reported, "Overall, 50 percent of the cases resulted in less than expected outcomes for the standard of practice of interventional cardiologists. . . . A 50 percent 'approval' rating is not satisfactory for interventional cardiology outcomes for this group of patients." In response, Dr. C.C. Calescibetta, the new chief of staff, and Dr. Cynthia Forsthoff, chair of the Medicine Committee, met with Dr. Pourzia and, after allowing him to review Dr. French's report, asked him to refrain from doing interventional procedures pending a more thorough investigation. Dr. Pourzia agreed (although he later asserted he did so under duress because he was threatened with suspension if he refused the request).

From February 1998 through late June 1998 the investigation subcommittee continued its work, conducting interviews of hospital employees and medical staff personnel regarding Dr. Pourzia's behavior. The subcommittee also received and reviewed Dr. Cobb's report, which concluded "the physician [Dr. Pourzia] performing these procedures[] has an inadequate understanding of the clinical data, and his interpretations of the angiogram are below the standard of care and below the performance of an invasive cardiologist that I would expect"

On June 23, 1998 the subcommittee reported its findings to the full Medicine Committee, which also heard directly from Drs. French, Cobb and Pourzia. The Medicine Committee recommended (by a vote of 10 to two) that Dr. Pourzia be allowed to continue to practice interventional cardiology at St. Mary if he completed certain continuing education courses and submit his next 25 procedures for concurrent review by another physician with interventional cardiology privileges. The Medicine Committee also recommended (by a vote of nine to two with one abstention) that Dr. Pourzia complete a course in stress management. The committee recommendations were affirmed by the Medical Staff Executive Committee (MSEC), which, under the medical staff bylaws, functions as the liaison between the organized medical staff and St. Mary's

governing board, the Hospital Community Board (Board). With minor modifications (for example, changing the requirement for concurrent review of a number of Dr. Pourzia's procedures to retrospective review), on July 24, 1998 the Board adopted the Medicine Committee/MSEC's recommendations. Dr. Pourzia's request for a formal hearing to review the Board's decision was denied.

2. On-going Issues Leading to the MSEC's Summary Suspension of Dr. Pourzia's Privileges

In August 1998 Dr. Pourzia, through his attorney, informed the MSEC he would not sign a consent and release form that had been presented to him in connection with the July 24, 1998 Board decision to permit him to continue practicing at St. Mary subject to certain conditions. The form authorized other medical facilities to release records and information regarding Dr. Pourzia's staff membership for peer review at St. Mary, but also purported to release St. Mary and the MSEC from any liability in connection with its evaluation of Dr. Pourzia's fitness to practice medicine. In early November 1998 Dr. Pourzia rescinded his prior agreement to discontinue performance of interventional procedures at St. Mary.

During the same period Dr. Calescibetta and Dr. Pourzia had a confrontation in the doctors' dining room at the hospital, in which, according to Dr. Calescibetta's account, Dr. Pourzia engaged in rude, unprofessional behavior. Dr. Pourzia has denied any shouting, rudeness or use of profanity. A further incident occurred several weeks later, following the death of another physician, in which Dr. Pourzia was described as having spoken about the death in a loud and inappropriate manner in the hospital hallway outside a waiting room.

Following Dr. Pourzia's purportedly unprofessional outbursts and the rescission of his agreement to voluntarily discontinue interventional cardiology procedures at St. Mary, on November 13, 1998 Dr. Calescibetta and Dr. Forsthoff, acting on behalf of the MSEC, summarily suspended Dr. Pourzia's interventional cardiology privileges. They based the summary suspension on article IV, section 7 of the medical staff bylaws, "Summary Removal and Limited Suspension," which provides, "[w]henver there exists

probable cause for believing that the health or safety of one or more patients could be imminently endangered if a practitioner is allowed to exercise unrestricted privileges pending the delivery of notice or right to hearing,” the chief of staff and chair of the applicable department “may summarily restrict or suspend some or all of the practitioner’s clinical privileges.”² Dr. Pourzia exercised his right under the medical staff bylaws to meet with the MSEC to discuss whether the suspension would be continued pending a hearing.

3. The MSEC Recommendation To Suspend Dr. Pourzia and Terminate His Privileges

Several days after the summary suspension Dr. Pourzia spoke by telephone with Dr. Greta Wanyik concerning Dr. Wanyik’s referral of one of his patients to another cardiologist. (The patient subsequently explained he had asked for the referral because he was concerned about Dr. Pourzia’s changed behavior.) Dr. Wanyik asserted that Dr. Pourzia verbally attacked her in the conversation, using abusive and vulgar language, a charge Dr. Pourzia denies (although he acknowledges the conversation itself took place).

On November 19, 1998 Drs. Calescibetta and Forsthoff convened a special MSEC meeting at which Dr. Calescibetta provided an overview of the concerns about Dr. Pourzia and the investigative subcommittee’s work and described the more recent behavioral issues. Dr. Edmond Whitley, a board-certified psychiatrist who had been invited to attend the meeting as a consultant, expressed his opinion Dr. Pourzia might be

² Business and Professions Code section 809, subdivision (a)(8), declares the Legislature’s intent “that written provisions implementing Sections 809 to 809.8, inclusive [governing peer review of professional health care services], in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably.” “It is these bylaws that govern the parties’ administrative rights.” (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617; accord, *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 97.)

psychologically impaired. (Dr. Whitley's opinion was based on the description of Dr. Pourzia's conduct made at the MSEC meeting, not on an examination of Dr. Pourzia.)

The MSEC met with Dr. Pourzia on November 20, 1998. Dr. Pourzia was urged to take a voluntary leave of absence and enter a diversion program for impaired physicians. Dr. Pourzia refused, although he did offer to take a one week vacation. The MSEC then voted to replace the summary suspension of Dr. Pourzia's interventional cardiology privileges with a summary suspension of all clinical privileges in accordance with article IV, section 7 of the bylaws. This action was based upon Dr. Pourzia's "management of various interventional, and one or more non-interventional, cardiology cases [at St. Mary, as detailed in the reports of Dr. French and Dr. Cobb]; coupled with one or more instance(s) of non-cooperation with the Medical Staff; coupled with ongoing, and in some instances mounting, concern with his judgment, his conduct and his emotional well-being and stability." Dr. Pourzia was notified of this action in writing.

The MSEC reconvened on December 2, 1998, again with Dr. Pourzia present, to provide Dr. Pourzia an opportunity to discuss the bases underlying the summary suspension of all his clinical privileges and to provide the MSEC an opportunity to modify, continue or terminate the summary suspension during the pendency of any formal hearing and review proceedings. Dr. French and Dr. Cobb also attended a portion of the meeting to review their findings directly with the MSEC. Copies of their reports were provided to Dr. Pourzia and all MSEC members in attendance at the meeting. The MSEC was also provided with copies of Dr. Pourzia's November 30, 1998 application to enter the Medical Board of California's physician diversion program.

The MSEC recommended the summary suspension be lifted if Dr. Pourzia agreed to certain conditions, including that he fully cooperate and remain in full compliance with the diversion program, immediately reinstate his agreement to abstain from the exercise of interventional cardiology privileges at St. Mary until he had satisfied specified educational requirements (completion of approved interventional cardiology courses) and cooperate with a chart review of his patients treated at St. Mary. The MSEC also

recommended Dr. Pourzia's membership on the medical staff be terminated if he did not agree to the conditions prescribed by the MSEC. Dr. Pourzia refused to accept the conditions. As a result, the summary suspension remained in place, and the recommendation was made that his staff privileges be terminated.

4. The Administrative Hearing before the Judicial Review Committee

Dr. Pourzia exercised his right to have an administrative hearing before a judicial review committee (JRC) to challenge the MSEC decision to suspend him and its recommendation his clinical privileges be terminated. Pursuant to Business and Professions Code section 809.1, subdivision (c)(1),³ Dr. Pourzia was given written notice of the reasons for the action proposed by the MSEC (the relevant peer review body), "including the acts or omissions with which the licentiate is charged." Charge I stated Dr. Pourzia had demonstrated "[d]eficiencies in clinical judgment, technique and/or skill constituting practice below the community-wide standard of care for interventional cardiology," as exemplified by four specific cases discussed by Drs. French and Cobb. Charge II, subsequently withdrawn, repeated the general language of charge I and identified a fifth patient allegedly harmed by Dr. Pourzia's deficient judgment or skills. Charge III alleged Dr. Pourzia had engaged in "inappropriate, disruptive, unprofessional and/or imprudent conduct within, and without, the Hospital" and identified several instances of this behavior including the May 1997 confrontation with the lab technician, the rude encounter with the nurse later that year, the November 1998 hallway outburst during the conversation regarding the death of a professional colleague and the abusive telephone conversation with Dr. Wanyik. Charge IV alleged Dr. Pourzia had refused to fully cooperate with the medical staff during the peer review process and detailed a number of specific instances of his noncooperation. Charge V, relating to the existing summary suspension of clinical privileges, asserted "there existed 'probable cause for believing that the health or safety of one or more patients could [have been] imminently

³ Statutory references are to the Business and Professions Code unless otherwise indicated.

endangered”” had the summary suspension not initially been imposed by Drs. Calescibetta and Forsthoff and thereafter continued by the MSEC.

Pursuant to section 809.3, subdivision (b)(3), the MSEC had the burden of persuading the JRC, as the trier of fact, by a preponderance of the evidence that its recommendation of terminating Dr. Pourzia’s clinical privileges was “reasonable and warranted.”⁴ The JRC initially consisted of seven physicians who were members of the medical staff at St. Mary. During the extended proceedings (the hearing began on January 25, 1999 and was not concluded until the JRC issued its report on June 11, 2002), however, two of the original seven physicians left the panel; and the JRC decision and recommendation was ultimately rendered by five committee members.

There were 26 separate hearing sessions; a lawyer from a private Los Angeles law firm acted as hearing officer. Both the MSEC and Dr. Pourzia presented a substantial volume of evidence by way of oral testimony, including testimony by Dr. Pourzia, and written exhibits. The parties made oral closing arguments and also submitted written briefs. In accordance with the medical staff bylaws, Dr. Pourzia was assisted by other physicians during the hearing. (Neither Dr. Pourzia nor the MSEC was represented by counsel.)

The JRC issued an 18-page written decision and recommendation. It found, based on the evidence presented including patient charts and expert testimony, that Dr. Pourzia’s management of two of the four patient cases identified in charge I fell below the applicable standard of care. As to one of the remaining two cases, the JRC found the evidence established Dr. Pourzia had made an error in judgment but his overall

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Article IV, section 5 of the medical staff bylaws, “Conduct of Hearings,” provides, “In any Judicial Review Committee hearing, the burden of going forward with the evidence shall be borne by the Medical Staff, whereafter the said burden shall shift to the candidate or member. . . . In the case of any member . . . , the Medical Staff shall bear the burden of persuading the Judicial Review Committee, by a preponderance of the evidence, that the recommendation, decision or action of the Medical Staff was not arbitrary, capricious or irrational.”

management of the case did not fall below the standard of care. As to the fourth case, the JRC found the evidence established there was “incomplete revascularization,” but again the overall case management did not fall below the applicable standard of care.

The JRC found “from the evidence presented that Charge III is sustained by the evidence. Dr. Pourzia engaged in inappropriate, disruptive and unprofessional behavior on a number of occasions between May 1997 and November 1998.” The JRC further found charge IV, which concerned Dr. Pourzia’s alleged refusal to fully cooperate in the peer review process, “is sustained by the evidence presented at the Hearing.” In connection with this finding the JRC observed, “The MSEC made repeated efforts to avoid the possible necessity of further disciplinary action with regard to Dr. Pourzia and to work out a solution so as to avoid formal suspension of his privileges, and the necessity for filing [a section] 805 Report with the Medical Board of California [advising the Medical Board of a restriction, suspension or termination of a physician’s staff privileges]. Dr. Pourzia refused to cooperate or to honor an agreement he had made.”

Based on its evaluations of charges I, III and IV, the JRC also found charge V sustained by the evidence, that is, it was reasonable and warranted for the MSEC to conclude probable cause existed for believing the health or safety of one or more patients could have been imminently endangered if Dr. Pourzia’s privileges were not summarily suspended. In light of all of the foregoing findings, the JRC concluded “the action taken on November 20, 1998 and December 4, 1998 summarily suspending all of Dr. Pourzia’s privileges was reasonable and warranted and was not arbitrary, capricious or irrational.” In addition, the JRC found the MSEC’s December 4, 1998 recommendation that Dr. Pourzia’s clinical privileges at St. Mary be terminated “was also reasonable and warranted and was not arbitrary, capricious or irrational.” Based on its findings and conclusions, the JRC recommended the actions and recommendation of the MSEC “be affirmed.”

5. Board Adoption of the JRC's Final Recommendations

On June 17, 2002 Dr. Pourzia was advised by certified mail of his right under the medical staff bylaws to appeal the JRC decision to the Board. Dr. Pourzia exercised his right to appeal and, by letter dated July 19, 2002, identified 12 issues supporting his appeal.

The Board appointed an appellate review committee and selected a hearing officer. On August 20, 2002 the hearing officer notified Dr. Pourzia and counsel for the MSEC the appellate review hearing would take place on October 16, 2002. Dr. Pourzia was requested to inform the hearing officer if he was represented by counsel and to participate in a procedural prehearing conference not later than September 13, 2002. A simultaneous exchange of opening memoranda was scheduled for September 27, 2002, and exchange of reply memoranda on October 8, 2002. Additional notices were sent on September 5, 2002 and September 11, 2002 regarding the prehearing conference. Neither Dr. Pourzia nor counsel representing him responded to these notices. A reminder notice was sent on September 24, 2002 regarding the due date for the submissions of the parties' opening memoranda.

On September 27, 2002, apparently after receiving the MSEC's opening brief, Dr. Pourzia contacted the hearing officer by facsimile transmission, stating he had engaged an attorney and requesting a 30-day "grace period" to prepare for the appellate review. The hearing officer deemed the letter a request for postponement and invited written argument from counsel on the request. The request for postponement was thereafter denied for lack of a showing of good cause: "Dr. Pourzia had almost 90 days from his request for appeal to the date for submission of memoranda to obtain an attorney or prepare his own brief. He provided no reason for his failure other than he was relocating his office and that his attorney was in trial. . . . Allowing Dr. Pourzia a postponement at the last hour and at a time after the [MSEC] brief has been submitted would result in an unfair result, not anticipated under the Bylaws."

As provided in the bylaws, the Board deemed Dr. Pourzia's failure to file an opening brief and thus to complete a mandatory or permissive stage of appellate review as acceptance of the decision of the JRC. "Dr. Pourzia's waiver of his right to appellate review occurred when he failed to present a brief in timely fashion Dr. Pourzia's failure to submit memoranda has resulted in the process proceeding . . . as if he did not exercise his right to appellate review."

On November 15, 2002, based upon its review and discussion of the JRC's report, the Board determined it was in the interest of St. Mary to adopt the JRC's report and recommendation. Accordingly, by resolution the Board adopted and approved as "reasonable, necessary and warranted" the JRC's final recommendation to terminate Dr. Pourzia's staff privileges.

6. Dr. Pourzia's Legal Challenges to the Decision To Revoke His Privileges

On October 23, 2003 Dr. Pourzia filed an unverified complaint and thereafter an unverified first amended complaint against St. Mary and several individuals affiliated with St. Mary (including Dr. Calescibetta), purporting to allege both tort and contract causes of action and seeking compensatory and punitive damages, based on the summary suspension and ultimate revocation of his staff privileges. St. Mary demurred on the ground Dr. Pourzia had failed to challenge the adverse findings made through the hospital's quasi-judicial peer review process by a timely mandamus petition, relying on *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 484; the demurrer was overruled. After answering the first amended complaint, St. Mary moved for judgment on the pleadings, again asserting Dr. Pourzia's damage claims were precluded by the requirement of exhaustion of judicial remedies. As he had in opposing the demurrer, Dr. Pourzia argued in response to the motion judicial review by administrative mandamus pursuant to Code of Civil Procedure section 1094.5 is not required when a denial of due process has been alleged: According to Dr. Pourzia, St. Mary's due process violations "excused" and "obviated[d] the necessity of a mandamus proceeding." This

time the trial court accepted St. Mary's position, granted the motion and dismissed the action.

On appeal, represented by new counsel, Dr. Pourzia for the first time acknowledged the binding force of *Westlake Community Hospital v. Superior Court*, *supra*, 17 Cal.3d 465, and requested an opportunity to file an amended pleading in the form of a petition for writ of administrative mandamus. In response this court gave Dr. Pourzia somewhat more than he had sought, concluding there was no need to file an amended pleading because the first count of the first amended complaint (for intentional interference with profession) contained the necessary allegations to support writ relief—save only for a verification and a request that the discipline imposed and the findings supporting that discipline be set aside. (See *Pourzia v. St. Mary Medical Center* (Aug. 30, 2006, B178159) [nonpub. opn.].) Thus, we concluded Dr. Pourzia's complaint should be deemed a petition for administrative mandamus and directed the trial court to vacate its order granting the motion for judgment on the pleadings, to enter a new order granting the motion only as to counts two through 10 and to set a reasonable time for Dr. Pourzia to file and serve a verification as to count one. (The trial court was also directed to determine if any of the individual defendants named in count one had any residual administrative capacity and to dismiss them from the newly constituted administrative mandamus action if they did not.)

On remand, following additional pleading practice, full briefing and oral argument, the trial court denied the petition for writ of administrative mandamus and entered judgment in favor of St. Mary. The court noted at the outset of its written decision denying the petition that it was reviewing the final report and findings of the JRC, not the interim restriction or suspension of Dr. Pourzia's privileges. The court then found the JRC's findings were supported by substantial evidence, observing that the bulk of Dr. Pourzia's argument "does not attack the existence of substantial evidence, but rather seeks to have the court re-weigh the evidence in Dr. Pourzia's favor." The court further ruled Dr. Pourzia had a fair hearing, finding he had notice of the JRC hearing and

ample opportunity to respond to the charges leveled against him, as well as to rebut or impeach witnesses.

The trial court summarized its conclusions in the final paragraph of its decision, “On review of the entire voluminous record, it is clear that substantial resources were devoted by [St. Mary] in efforts to accommodate [Dr. Pourzia] and avoid his suspension. There is no credible evidence that these proceedings were in retaliation for Dr. Pourzia’s advocacy of patient’s rights and safety, as he appears to contend. There is no credible evidence of a conspiracy against Dr. Pourzia. Any evidentiary errors by the Judicial Review Committee were not so prejudicial as to require reversal or rehearing. Dr. Pourzia had a fair opportunity to present evidence and cross-examine witnesses. There was substantial evidence to support the findings in each charge sustained, conflicts in evidence notwithstanding. . . . Although Dr. Pourzia minimizes each of the subject incidents, collectively they reflect a serious disruption of hospital morale and efficiency.”

CONTENTIONS

Dr. Pourzia contends the JRC improperly reviewed the MSEC’s recommendation to suspend him and terminate his privileges under a deferential abuse of discretion standard rather than independently determining the merits of the charges against him and the appropriate discipline, if any, to impose. He also contends the JRC proceeding did not afford him a fair procedure to contest the charges, primarily based on the purportedly improper admission of certain negative evidence and the wrongful exclusion of exculpatory information. Finally, he contends the denial of his request for an extension of time to file an appeal memorandum with the Board challenging the JRC’s findings and recommendation was arbitrary and unreasonable.

DISCUSSION

1. Overview of California’s Peer Review Process

In its recent decision in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259 (*Mileikowsky*), the Supreme Court provided a concise summary of the peer review system in which Dr. Pourzia’s suspension and termination occurred.

“Decisions concerning medical staff membership and privileges are made through a process of hospital peer review. Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. [Citations.] The medical staff must adopt written bylaws ‘which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.’ [Citations.] The medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed. [Citation.] In 1989, California codified the peer review process at Business and Professions Code section 809 et seq., making it part of a comprehensive statutory scheme for the licensure of California physicians and requiring acute care facilities such as West Hills to include the process in their medical staff bylaws.” (*Id.* at p. 1267.)

As the *Mileikowsky* Court explained, quoting section 809, subdivision (a)(6), the primary purpose of the peer review process is to safeguard the health and welfare of the people of California by excluding “‘those healing arts practitioners who provide substandard care or who engage in professional misconduct.’” (*Mileikowsky, supra*, 45 Cal.4th at p. 1267.) In addition, the process reduces hospitals’ potential exposure to malpractice liability by removing incompetent physicians from their staff. (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 12.) The peer review system, however, also protects competent practitioners from being barred from practice for arbitrary or discriminatory reasons. “Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician’s right or privilege to use a hospital’s facilities deprives the physician of a property interest directly connected to the physician’s livelihood.” (*Mileikowsky*, at p. 1267.)

“The peer review process, while generally delegating responsibility to the private sector to monitor the professional conduct of physicians, establishes minimum protections for physicians subject to adverse action in the peer review system. [Citations.] Where, as here, a peer review committee recommends a ‘final proposed action’ that will require a hospital to file a report with the [State] Medical Board [pursuant to section 805], the affected physician is entitled to notice and may request a hearing for the purpose of determining if the recommendation is reasonable and warranted. [Citations.] ‘The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate [i.e., the physician] and the peer review body, or before a panel of unbiased individuals . . . which shall include, where feasible, an individual practicing the same specialty as the licentiate.’ [Citation.] At the hearing, both parties have the right to call, examine, and cross-examine witnesses and to present and rebut evidence. [Citation.] Upon the completion of the hearing, the parties are entitled to the written decision of the trier of fact, ‘including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.’” (*Mileikowsky, supra*, 45 Cal.4th at pp. 1268-1269.) A physician, therefore, has the right to have a second body of peers independently determine whether a peer review committee’s recommendation to terminate the physician’s staff privileges is reasonable and warranted “after considering not only the evidence that led to the peer review committee’s findings, but also any additional evidence produced at the hearing.” (*Id.* at p. 1269.)

2. *Standard of Review*

In an administrative mandamus action involving a disciplinary decision by a private hospital’s governing body, the function of the appellate court is usually the same as the superior court’s: First, we determine whether the correct standard was used in conducting the proceedings, an issue we consider *de novo*. (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1106-1107 (*Weinberg*); see *Huang v.*

Board of Directors (1990) 220 Cal.App.3d 1286, 1294-1295.) Second, we review the administrative record to determine whether the dispositive findings are supported by substantial evidence in light of the whole record. (*Weinberg*, at p. 1107; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136-1137 (*Hongsathavij*).)

Whether the administrative procedures used by St. Mary to discipline Dr. Pourzia satisfy California statutory law and comport with the common law requirement of a fair procedure is a question of law we review de novo. (See *Weinberg*, *supra*, 119 Cal.App.4th at p. 1114; see generally *Veguez v. Governing Bd. of the Long Beach Unified School Dist.* (2005) 127 Cal.App.4th 406, 414.)

3. *The JRC Applied the Proper Legal Standard in Recommending the Actions of the MSEC Be Approved*

Section 809.3, subdivision (b)(3), imposed on the MSEC the burden of persuading the JRC, as the trier of fact, by a preponderance of the evidence that its recommendation of terminating Dr. Pourzia's clinical privileges was "reasonable and warranted." The JRC's 18-page written decision and recommendation, summarized above, properly applied that standard to conclude the summary suspension of Dr. Pourzia's privileges in November and December 1998 and the MSEC recommendation to terminate his privileges were, in fact, reasonable and warranted (as well as, in the language of the medical staff bylaws, not arbitrary, capricious or irrational).

Disregarding the clear language of the written decision, however, Dr. Pourzia has combed the reporter's transcript of the proceedings before the JRC and identified a number of instances in which the hearing officer appeared to indicate the MSEC's recommendations should be reviewed under a deferential abuse-of-discretion standard, rather than determining, following an independent review of the evidence, whether a reasonable basis existed for the actions, as mandated by the Business and Professions Code. Notwithstanding the isolated and out-of-context statements proffered by

Dr. Pourzia, his argument is misplaced.⁵ As reflected in its written decision, which, of necessity, is the basis for our review of the administrative hearing process (see § 809.4, subd. (a)(1) [physician has right to “written decision of the trier of fact, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached”]), as to each of the four sustained charges, the JRC independently considered all the evidence and concluded it was legally sufficient to find the charges true (albeit as to charge I, finding Dr. Pourzia had been seriously deficient in his care with respect to two, not four, patients). That is exactly what the Business and Profession Code requires. The JRC applied the correct standard of review. (See *Weinberg, supra*, 119 Cal.App.4th at p. 1111, fn. 2 [notwithstanding some language suggesting hospital board assumed role of an appellate body, review of final decision justified conclusion board exercised its independent judgment regarding the disciplinary determinations].)

4. *Dr. Pourzia Received a Fair Hearing Before the JRC*

““[A] private hospital may not deprive a physician of staff privileges without granting him minimal due process of law protection.” [Citations.] However, “[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected party] to present his position.”” (*Huang v. Board of Directors, supra*, 220 Cal.App.3d at p. 1295; see *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12

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Summarizing its function under the medical staff bylaws, the hearing officer explained, “There is really just one issue in this case, though admittedly it can be an emotionally difficult issue to resolve. The issue simply put is this: Was the [MSEC’s] action to uphold the summary suspension of Dr. Pourzia’s clinical privileges and to recommend the determination of his medical staff privileges reasonable and warranted, not arbitrary, capricious or irrational? Your job is to answer that question by weighing the evidence and following the bylaws.” The JRC’s written decision demonstrates it followed that instruction and properly performed the duties under the Business and Professions Code and medical staff bylaws.

Cal.3d 541, 555; *Weinberg*, *supra* 119 Cal.App.4th at p. 1108.) In disciplining its professional staff, a hospital must afford physicians “rudimentary procedural and substantive fairness” (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278), but its “expert supervisory judgment as to a [physician’s] competence must necessarily be accorded great weight.” (*Id.* at p. 279; see also *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1266 [“[j]udges are untrained and courts ill-equipped for hospital administration and therefore should not second-guess policies made rationally and in good faith unless the policy is clearly unlawful”; internal quotation marks omitted].)

Dr. Pourzia received ample notice of the charges against him and was given a reasonable opportunity to respond to those charges before the JRC. He acknowledges the JRC’s hearing procedures were at least superficially adequate (although characterizing the process as a “whited sepulchre”⁶) and effectively concedes (as the trial court ruled) substantial evidence supports the JRC’s findings and recommendations. His challenge to the fairness of the hearing focuses instead on the purportedly prejudicial effect of certain irrelevant and inflammatory evidence he asserts was improperly received by the JRC, as well as the improper exclusion of exculpatory information by the hearing officer.⁷ In light of the fundamental standard of fairness required for peer review proceedings, the procedures utilized and evidentiary rulings made were reasonable; Dr. Pourzia was given

⁶ “Woe unto you, scribes and Pharisees, hypocrites! for ye are like unto whited sepulchres, which indeed appear beautiful outward, but are within full of dead men’s bones, and of all uncleanness.” (Matthew 23:27 [Bible, King James version].)

⁷ Dr. Pourzia recognizes the admission of evidence at the JRC hearing need not conform to the formal rules found in the Evidence Code. (See *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 834.) Indeed, the medical staff bylaws expressly provide, “The Judicial Review Committee hearing shall not be conducted according to the strict rules of judicial procedures or according to the technical rules of evidence in administrative agency and judicial procedures or according to the technical rules of evidence in administrative agency and judicial actions; provided, however, that the presiding officer shall be authorized to reject any such testimony or evidence which he regards as irrelevant or of a type upon which a responsible person would not rely in the conduct of serious affairs.”

an adequate opportunity both to rebut the charges against him and to affirmatively present his defense; and any technical errors in rulings by the hearing officer were harmless.

a. *Admission of unredacted copies of Medicine Committee minutes*

The hearing officer allowed unredacted copies of minutes of Medical Committee meetings from June 1997 and November and December 1998, which contained critiques of Dr. Pourzia's conduct, to be presented to the JRC. Dr. Pourzia notes the minutes record unsubstantiated accusations against him and include matters that were not the basis for any of the charges filed. Thus, he argues, it was manifestly unfair and prejudicial to allow the JRC to review them.

Nothing in the written decision of the JRC or elsewhere in the administrative record indicates the panel relied in any way on the portions of the minutes challenged by Dr. Pourzia. Absent any showing of prejudice, even if it were error for the hearing officer to allow unredacted copies of the minutes to be reviewed by the JRC members, the error did not deny Dr. Pourzia a fair hearing. (Cf. *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52.)

b. *Observations by the MSEC's psychiatric consultant*

As discussed, based on its evaluation of charges I, III and IV, the JRC found charge V, which alleged the MSEC's summary suspension of Dr. Pourzia's privileges was supported by probable cause for believing the health or safety of patients was in imminent danger, sustained by the evidence. As the final item supporting this conclusion, after reviewing the full range of issues involving Dr. Pourzia's behavior and patient care and detailing the investigation and staff evaluations culminating in the suspensions, the JRC noted, "His accelerating behavioral problems led to serious doubts as to his mental stability, which doubts were confirmed by a psychiatrist member of the Hospital's Physician Aid Committee [Dr. Whiteley] who testified at this JRC Hearing and at the MSEC's meetings of November 19 and 20, 1998."

Dr. Pourzia argues it was improper for the JRC to consider the views of Dr. Whiteley because he did not personally examine Dr. Pourzia or thoroughly review all of the relevant evidence before offering his views. However, through questioning by his representative at the JRC hearing, Dr. Pourzia was able to fully expose the purported limitations and flaws in Dr. Whiteley's observations. (Dr. Pourzia does not dispute Dr. Whiteley's general qualifications or expertise.) In addition, as Dr. Pourzia notes in his opening brief on appeal, Dr. Whiteley did not discount the psychiatric reports favoring Dr. Pourzia that were introduced at the JRC proceedings. Viewing the record as a whole, it is apparent Dr. Whiteley's comments were, at most, cumulative, and of minimal significance to the ultimate decision by the JRC. They plainly did not undermine the basic fairness of the hearing process.

c. The delayed dismissal of charge II

Charge I identified four patient cases allegedly mishandled by Dr. Pourzia. Charge II identified a fifth case. The charge was withdrawn in June 2001 during the extended JRC hearing process. Dr. Pourzia argues an autopsy report he first learned about in 2002 indicated Dr. Wanyik may have been involved in the death of the patient at issue in charge II and suggests, without support or elaboration, that the "concealed documents" might have been useful to impeach Dr. Wanyik, who had testified concerning Dr. Pourzia's intemperate and unprofessional telephone call in November 1998. The dismissal of charge II itself obviously did not prejudice Dr. Pourzia, nor is there any basis for concluding its pendency during the first part of the JRC hearing in any way disadvantaged him: Whatever information may have been introduced regarding that matter was not the basis for any of the JRC's final findings or recommendations. Finally, Dr. Pourzia's conjecture concerning the possible impeachment value of undisclosed documents is simply too speculative, without more, to be grounds for setting aside the extensive, 26-session JRC administrative hearing process.

d. *Reference to the pendency of Medical Board proceedings*

The staff physician presenting the MSEC's case to the JRC asked Dr. Caliscebetta, the St. Mary chief of staff, if the California Medical Board had investigated Dr. Pourzia. Dr. Caliscebetta said yes, but further inquiry (including any information concerning the Medical Board's decision) was interrupted by an objection from Dr. Pourzia, which was sustained by the hearing officer. Dr. Pourzia's contention this single, limited reference to a Medical Board investigation was so prejudicial as to undermine the fundamental fairness of the JRC hearing process borders on the frivolous—particularly since section 805 requires a report be filed with the Medical Board whenever a physician's staff privileges are suspended for more than 30 days for a medical disciplinary cause or reason, a requirement presumably well known to the physician members of the JRC.

e. *Exclusion of evidence of events post-dating the MSEC's decision and recommendation*

In an argument related to his contention the JRC improperly utilized a deferential standard of review, Dr. Pourzia complains the hearing officer erroneously excluded evidence of events occurring after December 4, 1998 (the date the MSEC recommended terminating Dr. Pourzia's privileges) on the ground evidence not before the MSEC could not be considered by the JRC as part of its determination whether the termination of Dr. Pourzia's privileges was reasonable and warranted. But the primary example proffered in support of this point—the exclusion of a letter certifying Dr. Pourzia had completed the diversion program—falls far short of demonstrating any unfairness in the hearing procedure. One of the witnesses testified he did not know if Dr. Pourzia had completed the diversion program. After some confusion as to whether the document certifying his completion had been produced to the parties or included as a marked exhibit, the hearing officer acknowledged it existed and stated, rather than admitting the document itself, Dr. Pourzia would be allowed to testify on the point even though the event post-dated the MSEC's decision. Nothing more was required.

Similarly, two psychiatric reports prepared in January 1999 opining that Dr. Pourzia did not have behavioral or anger management problems were not excluded,

as Dr. Pourzia contends, because they were not presented to the MSEC but because they were determined by the hearing officer not to be relevant to the issue whether, based on a review of all available evidence, the MSEC's recommendations of December 4, 1998 were reasonable. Dr. Pourzia's representative argued a subsequent opinion by an acknowledged expert was germane to an evaluation of Dr. Pourzia's condition at an earlier date. The hearing officer's rejection of that position, even if ultimately incorrect, did not constitute a miscarriage of justice or otherwise deprive Dr. Pourzia of a fair hearing, particularly in light of the admission of other psychiatric testimony supportive of Dr. Pourzia. (Moreover, as the hearing officer noted, he also rejected evidence harmful to Dr. Pourzia that related to post-December 1998 events. We certainly cannot say, had all the evidence been admitted, both positive and negative, there is a reasonable probability the outcome of the hearing process would have been more favorable to Dr. Pourzia.)

f. Exclusion of Dr. Schatz's report

Dr. Pourzia engaged Dr. Richard A. Schatz of the Scripps Clinic in La Jolla prior to the MSEC's December 2, 1998 meeting to critique his interventional performance. In a report dated January 6, 1999 Dr. Schatz evaluated the technical components of the care rendered in a number of cases, but not the "clinical indications" because he had not reviewed the patients' charts in detail. Although Dr. Pourzia was advised that films (X-rays) of cases being considered by the Medicine Committee's investigation subcommittee were available for his outside expert's review not later than May 1998, he did not attempt to have them copied until November 1998. As a result of that delay and various reproduction errors, the films were not provided to Dr. Schatz in time for him to perform his analysis and prepare his report prior to the MSEC's December 1998 meeting. Dr. Pourzia concedes he was "somewhat dilatory" in copying the films,⁸ but argues the

⁸ The trial court rejected Dr. Pourzia's contention St. Mary "is anyway responsible for his inability to timely obtain expert Dr. Schatz's report."

exclusion of the report, which controverted certain of the views expressed by Drs. French and Cobb, before the JRC was unfair and prejudicial.

We agree with Dr. Pourzia that Dr. Schatz's evaluation of the cases that were the subject of charge I, even though completed subsequent to December 2, 1998, was highly relevant to the JRC's determination whether the recommendation to terminate Dr. Pourzia's clinical privileges was reasonable. Dr. Pourzia was entitled to introduce exculpatory evidence even though it had not been presented to the MSEC. However, at the same time the hearing officer ruled Dr. Schatz's written report, which post-dated the MSEC decision, was inadmissible, he invited Dr. Pourzia to have Dr. Schatz appear as a witness on his behalf at the JRC hearing. "Bring him in here and let him testify and let him be subject to cross-examination, and then he can give you his opinion." The hearing officer also explained that letters prepared by Dr. Schatz prior to the December 2, 1998 MSEC meeting would be admitted, simply not the report prepared after the fact.

The response of Dr. Pourzia's representative was, in effect, that Dr. Schatz was too important and too busy to travel from La Jolla to Long Beach to testify in this matter. The hearing officer replied, "We have no exception for genius. They have to be present and available for examination." Under the circumstances, particularly the fact that the delay in the preparation of Dr. Schatz's written report was primarily attributable to Dr. Pourzia himself, the hearing officer's ruling was not unreasonable and did not deprive Dr. Pourzia of the opportunity for a fair hearing before the JRC.

g. The Board's hearing officer did not act arbitrarily in denying Dr. Pourzia's counsel additional time to file an appeal memorandum

Dr. Pourzia's final challenge to the fundamental fairness of the peer review process at St. Mary is directed to the denial of his last minute request for additional time to file a legal memorandum in connection with Dr. Pourzia's appeal of the JRC findings and recommendation to the Board. The trial court rejected the contention St. Mary was in any way responsible for Dr. Pourzia's failure to timely file an appeal memorandum, and we agree. As the hearing officer explained in finding the absence of good cause to continue the proceedings, the medical staff bylaws contemplated a simultaneous

exchange of memoranda by counsel for the MSEC and Dr. Pourzia. Rather than cooperate in the planning for the appellate proceedings by responding to the hearing officer's multiple requests for prehearing sessions or request additional time for briefing in advance of the filing deadline, Dr. Pourzia's counsel, in what can only be interpreted as a tactical ploy, waited until he had received the MSEC brief before seeking an extension. Under the circumstances the denial of Dr. Pourzia's request was neither arbitrary nor unfair.⁹

DISPOSITION

The judgment is affirmed. St. Mary is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

⁹ In *Mileikowsky v. West Hills Hospital & Medical Center*, *supra*, 45 Cal.4th at page 1271, decided after briefing was completed in this case, the Supreme Court held a hearing officer lacked the authority to terminate a peer review hearing as a sanction for a physician's failure to cooperate in the proceedings: "As it is the reviewing panel and not the hearing officer that determines whether the peer review committee's recommendation is warranted, it is the reviewing panel that should decide whether or not the physician's inability or refusal to engage in the reviewing process suffices to render any further proceedings unnecessary." Dr. Pourzia's effort to transform his argument the hearing officer abused his discretion in denying an extension of time to file his appellate memorandum to fall within the *Mileikowsky* holding is futile. *Mileikowsky* involved cancellation of the peer review hearing itself (the JRC proceeding), not an internal appeal of the completed peer review decision and recommendation. Moreover, unlike the situation in *Mileikowsky*, although the hearing officer made the initial determination to deny Dr. Pourzia's request for additional time to file his brief, the appellate review panel itself (the Board) expressly approved that decision and deemed the failure to submit a timely brief to be a forfeiture of his right to appeal.